Bursa Malaysia Securities Bhd v Gan Boon Aun

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–439 OF 2008
ZALEHA ZAHARI, HELILIAH AND SULONG MATJERAIE JJCA
11 FEBRUARY 2009

Administrative Law — Judicial review — Appeal against decision in granting leave to apply for judicial review — Whether any deliberation to be conducted by Bursa would be sub judice, in view of pending criminal proceedings against respondent — Whether respondent had good and arguable case for judicial review — Rules of the High Court 1980 O 53 r 3

Civil Procedure — Stay of proceedings — Application for — Pending criminal trial — Whether respondent had satisfied requirements of establishing arguable case or prima facie case — Whether court had power to stay decisions of an internal body of Bursa

Words and Phrases — 'stay of proceedings' — Whether 'stay of proceedings' capable of being applied to stay of decisions of an internal body of Bursa such as Listing Committee to put further stop to further conduct of its deliberations

The appellant ('Bursa') was a stock exchange vested with statutory functions under the Capital Markets and Services Act 2007 to ensure an orderly and fair market in the securities that were traded through its facilities. In order to sustain the required orderly and fair market Bursa was committed to undertake swift enforcement measures which usually commence with a show cause notice, deliberation and decision making process by a tribunal. The respondent was at all material times a non-independent executive director cum CEO of Transmile, a company listed in the Official List of the Bursa. Transmile reported a net profit of RM157.38m in its fourth quarterly report for the financial year ended 31 December 2006 (4th QR 2006); and a net profit of RM84.386m in its annual audited accounts for the financial year ended 31 December 2005 ('AAA 2005'). On 2 July 2007, Transmile issued its annual audited accounts to Bursa for the financial year ended 31 December 2006 ('AAA 2006') reporting a net loss of RM126.329m and its restated annual audited accounts ('AAA 2005') reporting a net loss of RM369.563m. In the discharge of its statutory duty Bursa issued notices to show cause dated 24 May 2007 and 2 July 2007 ('the notices to show cause')

on the respondent in respect of Transmile's non-submission of the AAA 2006, the Annual Report for the financial year ended 31 December 2006 ('AR 2006') as well as the Quarterly Report for the First Quarter ended 31 March 2007 (1st QR 2007) within the stipulated timeframes. On 12 July 2007 the Securities Commission preferred criminal charges against the respondent for making a misleading statement in a material particular in Transmile's Quarterly Report for the financial year ended 31 December 2006. On 20 August 2007 Bursa informed the respondent that the hearing on the two notices to show cause was fixed for 29 August 2007. In his letter dated 27 August 2007, the respondent wrote to the appellant suggesting that Bursa defer or stay this hearing pending the outcome of the criminal trial because Bursa's proposed deliberation would 'cause an overlap on a very central issue before the court' and any representation or decision made would be sub judice. Bursa in its letter dated 4 September 2007 informed the respondent that there was no issue of sub judice and that although 'there may be some overlap in the facts' the enforcement action by Bursa and the criminal trial were 'wholly different'. In the same letter of 4 September 2007 Bursa reminded the respondent that if no written response was made within seven days of the letter then the Listing Committee would proceed to deliberate on the matter without further notice. Despite this the respondent persisted by his letters dated 11 September 2007 and 16 November 2007 to convince Bursa to defer its proposed deliberations. Bursa in its letters dated 9 October 2007 and 29 October 2007 refuted the issue of sub judice and reiterated its stand that its deliberations would not prejudice the criminal trial. Then on 21 March 2008, the respondent filed a notice pursuant to O 53 r 3 of the Rules of the High Court 1980 ('RHC') for leave to commence proceedings to obtain an order of mandamus that the hearing brought by Bursa be deferred sine die until after the disposal of the criminal trial and for an order of prohibition and/or injunction against Bursa to defer any further decisions until after the final disposal of the criminal trial. In essence the ground upon which the application for leave had been made was pivoted on the alleged applicability of the sub judice rule. On 28 March 2008 the High Court judge granted the respondent leave to commence proceedings. This was Bursa's appeal against the High Court's decision granting leave for judicial review and for further allowing an oral application for an order to stay certain deliberations made by Bursa on 31 March 2008. The main issues for consideration in this appeal were the same issues that were relied on by the respondent in his application for leave for judicial review and include, inter alia, whether any deliberation to be conducted by Bursa would be sub judice, in view of the pending criminal proceedings; whether Bursa's deliberation was a decision amenable to judicial review; and whether the respondent had a good and arguable case for judicial review that had met all the pre-requisites of O 53 r 3 of the RHC.

Held, allowing the appeal and setting aside the order of the High Court granting leave to apply for judicial review and the order for stay of Bursa's deliberations, with costs:

(1) The true nature of the sub judice rule requires that there had to be established an actus reus and mens rea to cause certain publications which would have prejudicial effect on the criminal proceedings. However, in the instant appeal it could not even be gleaned whether the situation could lead to civil contempt and hence the court was invited to consider assertions which were speculative. Although Bursa made the statement that 'there may be some overlap in the facts', in effect this should not blur the different functions and the different objectives of the two proceedings, ie, the enforcement action and the criminal trial (see paras 31 & 33).

(2) When the respondent applied for leave to apply for judicial review he was unable to establish what parts of the material in the criminal proceedings would overlap with the deliberations of the enforcement proceedings. The matters before Bursa related to the issue of delay in the submission of the financial reports whereas the court in the pending criminal proceeding would consider essentials of what constitute 'making misleading statements'. In fact the respondent had not shown that the Listing Committee hearing the notices to show cause and the court would contemporaneously be considering the same or identical issues in a manner that would affect the evaluation in the other. Neither was it shown that ultimately the decision of the Listing Committee would lead to a predetermination of the matters pending in the criminal trial. As such, the respondent had failed to raise an arguable case and it would appear on the facts that the respondent had acted prematurely on his part (see paras 36–37).

(3) Apart from submissions premised on the sub judice rule the respondent had not been able to persuade this court that the enforcement proceedings were in excess of statutory authority or so erroneous in law such that in that regard Bursa was rendered susceptible to judicial review. In a highly fluid financial market the true nature of the reliefs sought are calculated to impose a crippling delay in derogation of the principle of timeliness and accuracy which is inept in matters of financial control (see para 44).

(4) It is essential to note that there is a requirement that an application under O 53 r 3(6) of the RHC had to be made promptly within 40 days from the date when grounds for the application first arose. From the facts of the present appeal it was found that the material date from which the 40 days was to be calculated was from the date of the letter dated 4 September 2007 from Bursa to the respondent. In its letter dated 4 September 2007 Bursa had resisted attempts by the respondent

to preclude the Listing Committee from proceeding to deliberate and also invited the respondent to submit if he so wished any written response. From that date the respondent had taken a period of more than five months to seek legal redress. Under the circumstances there was an absence of prompt action without any reasonable explanation given for the delay (see paras 46, 53–54).

(5) The granting of an order of stay in this appeal was granted as an order ancillary to the granting of leave. Hence similar to the consideration of the granting of an application for an interlocutory injunction, the applicant had to satisfy the requirements of establishing an arguable case or a prima facie case but in this appeal there was no affidavit supporting the application for an order of stay. In addition it was necessary to consider whether the phrase 'stay of proceedings' was capable of being applied to stay of decisions of an internal body of Bursa such as the Listing Committee to put a further stop to the further conduct of its deliberations. In the circumstances the court would be embarking on a process of rewriting a subsidiary legislation namely the RHC if it were to permit an interpretation of the words 'proceedings in question' to be applicable to an internal decision making process made by Bursa. It would spell an excess power if 'stay of proceedings' in this appeal would be extended to the internal deliberations of Bursa being a commercial entity vested with regulatory measures in the capital market (see paras 61–62 & 65).

[Bahasa Malaysia summary

Perayu ('Bursa') merupakan bursa saham yang telah diberikan dengan fungsi-fungsi statutori di bawah Akta Pasaran Modal dan Perkhidmatan 2007 bagi memastikan pasaran yang teratur dan adil dalam sekuriti-sekuriti yang didagangkan melalui kemudahan-kemudahannya. Bagi tujuan mengekalkan pasaran teratur dan adil Bursa terikat untuk melaksanakan langkah-langkah penguatkuasaan segera yang biasanya bermula dengan notis tunjuk sebab dan proses pertimbangan dan keputusan oleh tribunal. Responden pada setiap masa matan merupakan pengarah eksekutif tidak bebas merangkap Ketua Pegawai Eksekutif Transmile, sebuah syarikat yang disenaraikan di Senarai Rasmi Bursa. Transmile telah melaporkan keuntungan bersih RM157.8 juta dalam laporan suku keempatnya untuk tahun kewangan berakhir 31 Disember 2006 (LS ke-4 2006); dan keuntungan bersih RM84.386 juta dalam akaun-akaun audit tahunannya kepada Bursa untuk tahun kewangan berakhir 31 Disember 2006 ('AAT 2006') yang melaporkan kerugian bersih RM126.329 juta dan akaun-akaun audit tahunan yang dinyatakan semula ('AAT 2005') melaporkan kerugian bersih RM369.563 juta. Dalam melaksanakan kewajipan statutorinya Bursa telah mengeluarkan notis tunjuk sebab bertarikh 24 Mei 2007 dan 2 Julai 2007 ('notis-notis tunjuk sebab') ke

atas responden berkaitan AAT 2006 yang tidak dikemukakan oleh Transmile, Laporan Tahunan untuk tahun kewangan berakhir 31 Disember 2006 ('LT 2006') dan juga Laporan Suku Tahunan untuk Suku Pertama berakhir 31 Mac 2007 (LS pertama 2007) dalam jangka masa yang telah ditetapkan. Pada 12 Julai 2007 Suruhanjaya Sekuriti telah membuat pertuduhan jenayah terhadap responden kerana membuat kenyataan yang mengelirukan dalam butiran tertentu dalam Laporan Suku Tahunan Transmile untuk tahun kewangan berakhir 31 Disember 2006. Pada 20 Ogos 2007 Bursa telah memberitahu responden bahawa perbicaraan untuk dua notis tunjuk sebab tersebut telah ditetapkan pada 29 Ogos 2007. Dalam suratnya bertarikh 27 Ogos 2007, responden telah menulis kepada perayu mencadangkan agar Bursa menangguhkan atau menggantungkan perbicaraan ini sementara menunggu keputusan perbicaraan jenayah kerana cadangan pertimbangan Bursa akan '*cause an overlap on a very central issue before the court*' dan apa-apa representasi atau keputusan yang dibuat adalah *sub judice*. Dalam suratnya bertarikh 4 September 2007 Bursa memberitahu responden bahawa tiada isu tentang *sub judice* dan meskipun '*there may be some overlap in the facts*' tindakan penguatkuasaan oleh Bursa dan perbicaraan jenayah tersebut adalah '*wholly different*'. Dalam surat yang sama bertarikh 4 September 2007 Bursa mengingatkan responden jika tiada jawapan bertulis dibuat dalam masa tujuh hari surat itu diterima maka Jawatankuasa Penyenaraian akan terus mempertimbangkan perkara itu tanpa notis selanjutnya. Walaupun demikian responden terus mendesak melalui surat-suratnya bertarikh 11 September 2007 dan 16 November 2007 untuk meyakinkan Bursa agar menangguhkan cadangan pertimbangannya. Bursa di dalam surat-suratnya bertarikh 9 Oktober 2007 dan 29 Oktober 2007 telah menyangkal isu tentang *sub judice* dan mengulangi pendiriannya bahawa pertimbangannya tidak memprejudiskan perbicaraan jenayah itu. Kemudian pada 21 Mac 2008, responden telah memfailkan notis menurut A 53 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') memohon kebenaran untuk memulakan prosiding untuk mendapatkan perintah mandamus agar perbicaraan yang dimulakan oleh Bursa ditangguhkan sine die sehingga perbicaraan jenayah selesai dan untuk perintah larangan dan/atau injunksi terhadap Bursa menangguhkan apa-apa keputusan selanjutnya sehingga selepas penyelesaian muktamad perbicaraan jenayah. Pada dasarnya alasan di mana permohonan mendapatkan kebenaran itu dibuat adalah berpaksikan pengataan pemakaian rukun *sub judice*. Ini merupakan rayuan Bursa terhadap keputusan Mahkamah Tinggi memohon kebenaran untuk semakan kehakiman dan untuk seterusnya membenarkan permohonan lisan untuk perintah menggantungkan pertimbangan tertentu yang dibuat oleh Bursa pada 31 Mac 2008. Isu-isu utama untuk dipertimbangkan dalam rayuan ini merupakan isu-isu yang sama yang digunakan oleh responden dalam permohonannya untuk mendapatkan kebenaran semakan kehakiman dan termasuklah, antara lain, sama ada apa-apa pertimbangan yang dilaksanakan oleh Bursa adalah *sub judice*, memandangkan terdapat prosiding jenayah yang

masih belum selesai; sama ada pertimbangan Bursa merupakan keputusan yang memerlukan semakan kehakiman; dan sama ada responden mempunyai kes yang baik dan boleh dihujahkan untuk semakan kehakiman yang memenuhi semua pra syarat A 53 k 3 KMT.

Diputuskan, membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi memberikan kebenaran untuk memohon semakan kehakiman dan perintah untuk penggantungan pertimbangan Bursa, dengan kos:

(1) Sifat sebenar rukun *sub judice* memerlukan pembuktian *actus rea* dan *mens rea* untuk menyebabkan penerbitan tertentu yang mempunyai kesan prejudis ke atas prosiding jenayah. Walau bagaimanapun, dalam rayuan ini tidak dapat ditentukan sama ada keadaan sedemikian boleh membawa kepada penghinaan sivil dan justeru itu mahkamah diajak untuk mempertimbangkan kenyataan-kenyataan yang spekulatif. Meskipun Bursa telah membuat kenyataan bahawa '*there may be some overlap in the facts*', pada hakikatnya ini tidak sepatutnya mengaburi perbezaan fungsi-fungsi dan perbezaan objektif kedua-dua prosiding tersebut, iaitu tindakan penguatkuasaan dan perbicaraan jenayah (lihat perenggan 31 & 33).

(2) Apabila responden memohon kebenaran untuk semakan kehakiman dia gagal membuktikan bahagian manakah bahan dalam prosiding jenayah yang bertindan dengan pertimbangan untuk prosiding penguatkuasaan. Perkara-perkara di hadapan Bursa adalah berkaitan isu kelewatan mengemukakan laporan-laporan kewangan manakala mahkamah dalam prosiding jenayah yang belum selesai tersebut akan mempertimbangkan asas-asas yang membentuk '*making misleading statements*'. Bahkan responden tidak menunjukkan bahawa Jawatankuasa Penyenaraian yang mendengar notis-notis tunjuk sebab tersebut dan mahkamah akan pada masa sama mempertimbangkan isu-isu yang sama atau serupa dalam cara yang akan menjejaskan penilaian yang satu lagi. Bahkan tidak ditunjukkan bahawa akhirnya keputusan Jawatankuasa Penyenaraian akan membawa kepada pratentuan perkara-perkara yang belum selesai dalam perbicaraan jenayah. Oleh itu, responden telah gagal untuk menimbulkan kes yang boleh dihujahkan dan ia kelihatan atas fakta bahawa responden telah bertindak pramatang dipihaknya (lihat perenggan 36–37).

(3) Selain daripada penghujahan-penghujahan yang berasaskan rukun *sub judice* responden tidak berjaya meyakinkan mahkamah ini bahawa prosiding penguatkuasaan itu telah melampaui kuasa statutori atau amat salah dari segi undang-undang sehingga menyebabkan Bursa mudah terpengaruh memohon semakan kehakiman. Dalam pasaran kewangan yang sering berubah-ubah sifat sebenar relief-relief yang

dipohon boleh dikira sebagai mengakibatkan kelewatan dalam pengurangan prinsip kesemasaan dan ketepatan yang tidak sesuai dalam perkara-perkara kawalan kewangan (lihat perenggan 44).

(4) Adalah penting untuk menekankan bahawa terdapat keperluan bahawa permohonan di bawah A 53 k 3(6) KMT perlu dibuat dengan segera dalam tempoh 40 hari dari tarikh alasan-alasan untuk permohonan mula timbul. Berdasarkan fakta-fakta rayuan ini didapati bahawa tarikh material dari tempoh 40 hari itu perlu dikira dari tarikh surat bertarikh 4 September 2007 daripada Bursa kepada responden. Dalam suratnya bertarikh 4 September 2007 Bursa menentang percubaan oleh responden untuk menghalang Jawatankuasa Penyenaraian daripada terus mempertimbangkan dan juga mengajak responden mengemukakan apa-apa jawapan bertulis jika dia ingin berbuat sedemikian. Dari tarikh tersebut responden telah mengambil masa lebih daripada lima bulan untuk mendapatkan penghakiman mahkamah. Dalam keadaan sedemikian terdapat ketiadaan tindakan segera tanpa apa-apa penjelasan munasabah diberikan untuk kelewatan tersebut (lihat perenggan 46, 53–54).

(5) Kebenaran perintah penggantungan dalam rayuan ini telah diberikan sebagai perintah sampingan kepada pemberian kebenaran. Justeru itu sama seperti pertimbangan memberikan permohonan untuk injunksi interlokutori, pemohon hendaklah memenuhi keperluan-keperluan bagi membuktikan kes yang boleh dihujahkan atau kes prima facie tetapi dalam rayuan ini tiada afidavit yang menyokong permohonan untuk perintah penggantungan. Tambahan pula adalah perlu untuk dipertimbangkan sama ada frasa '*stay of proceedings*' dapat digunakan untuk penggantungan keputusan badan dalaman Bursa seperti Jawatankuasa Penyenaraian agar dapat menghentikan pelaksanaan selanjutnya terhadap pertimbangan-pertimbangannya. Dalam keadaan sedemikian mahkamah akan memulakan proses menulis semula perundangan subsidiari iaitu KMT jika ia membenarkan pentafsiran perkataan-perkataan '*proceedings in question*' digunakan dalam proses membuat keputusan dalaman yang dibuat oleh Bursa. Ia akan menandakan kuasa yang berlebihan jika '*stay of proceedings*' dalam rayuan ini dikemukakan untuk pertimbangan dalaman Bursa yang merupakan entiti komersial yang diberikan langkah-langkah peraturan dalam pasaran modal (lihat perenggan 61–62 & 65).]

Notes

For cases on application of stay of proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6510–6538.

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 190–218.

Cases referred to

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228, SC (refd)
Attorney General v Times Newspaper Ltd [1973] 3 All ER 54, HL (refd)
Harris Mohd Salleh v The Returning Officer, Ismail bin Haji Majid & Ors and another action (No 2) [2001] 6 MLJ 610, HC (refd)
Kwikasair Industries Ltd v Sydney Stock Exchange Ltd (1968) ASLC 30701 (refd)
Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd & Anor [1991] 1 WLR 550, PC (refd)
Otter Gold Mines Ltd v Deputy Forest (AAJ) & Ors (1997) 22 ACSR 713, FC (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 2 CLJ 532, CA (refd)
R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, Ex parte Else Ltd & Anor [1993] QB 534, CA (refd)
R v Michael S Chance Ex Parte Smith & Ors [1995] BCC 1095 (refd)
R v Panel on Take-overs and Mergers, ex parte Datafin plc and another (Norton Opax plc and another intervening) [1987] 1 All ER 564; [1987] QB 815, CA (refd)
R v Secretary of State for Education and Science, ex p Avon County Council [1991] 1 QB 558, CA (refd)
R v Securities and Futures Authority ex p Panton (unreported; 20 June 1994) (refd)
Rekapacific Bhd v Securities Commission & Anor and other appeals [2005] 2 MLJ 269, CA (refd)
Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 MLJ 53, HC (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 56, CA (refd)

Legislation referred to

Administrative Appeals Tribunal Act 1975 [AUS] s 41(2)
Administrative Discussions (Judicial Review) Act 1977 [AUS] s 15
Capital Markets and Services Act 2007 ss 11, 11(3), 177, 370
Courts of Judicature Act 1964 s 3
Interpretation Acts 1948 and 1967
Rules of the High Court 1980 O 53 rr 2(3), 3, 3(5), (6), 5
Securities Industry Act 1983 ss 86, 86(b), 122C
Supreme Court Practice 1993 [UK] O 53 r 3(1)

Appeal from: Application for Judicial Review No R1–25–77 of 2008 (High Court, Kuala Lumpur)

Lim Chee Wee (Ruth Garnet Maran with him) (Skrine & Co) for the appellant.

Lee Yit Siong (Cheah Sin Chan with him) (Adnan Sundra & Low) for the respondent.

Heliliah JCA:

[1] The appellant (the respondent in the High Court) namely Bursa Malaysia Securities Bhd (or 'Bursa') lodged an appeal against the decision of the High Court rendered on 28 March 2008 as follows:

(i) granting leave in the application for judicial review filed by the respondent in the appeal (the applicant in the High Court) namely Gan Boon Aun ('GBA').

(ii) further allowing an oral application for an order to stay certain deliberations which were to have been made on 31 March 2008 by the appellant, Bursa.

[2] The application for leave filed by GBA sought to commence proceedings to obtain:

(a) An order of mandamus that the hearing and/or proposed deliberations brought by Bursa Malaysia Securities Berhad under its letters dated 19 February 2008 and 27 February 2008 against GBA pursuant to the provisions of the Bursa Malaysia Securities Berhad Listing Requirements (LR) be deferred sine die until after the final disposal of Kuala Lumpur Sessions Court Criminal Case No 62A-302 of 2007 and all appeals thereof, on the grounds stated in the statement in support of the application for leave.

(b) An order of prohibition and/or injunction against Bursa Malaysia Securities Berhad to defer any further decision(s) by BMSB to enforce under the provisions of the LR against the applicant until after the final disposal of Kuala Lumpur Sessions Court Criminal Case No 62A-302 of 2007 and all appeals thereof, on the grounds stated in the statement.

[3] On 28 March 2008 after having considered written submissions filed by Bursa and GBA the High Court judge granted leave for the commencement of proceedings in respect of the reliefs sought. An interim stay of the deliberations of the Listing Committee was also ordered. The grounds for his decision are not available. The proceedings for judicial review has been fixed to commence on 9 August 2012.

[4] Hence this appeal has arisen from a decision of the High Court judge given at the first stage of an application for leave for judicial review filed pursuant to O 53 r 3 of the Rules of the High Court 1980 ('RHC') namely, at the stage of the application for leave itself. Before embarking on the issues

raised the background and essential facts leading to the appeal need to be elucidated.

BACKGROUND

[5] Bursa is a stock exchange vested with statutory functions under the Capital Markets and Services Act 2007 ('CMSA 2007') to ensure an orderly and fair market in the securities that are traded through its facilities. To be noted is that the CMSA 2007 has superseded the Securities Industries Act 1983. Specific mention is also to be made of s 11 of the CMSA 2007 which provides:

> Section 11
>
> (1) For the purposes of this section, sections 12, 13 and 27:
>
> (a) 'exchange' refers to a stock exchange or a futures exchange; and
>
> (b) 'relevant person' means a participating organisation or an affiliate.
>
> (2) It shall be the duty of an exchange to ensure, so far as may be reasonably practicable, an orderly and fair market in the securities or futures contracts that are traded through its facilities.
>
> (3) In performing its duty under subsection (2), the exchange shall
>
> (a) act in the public interest having particular regard to the need for the protection of investors; and
>
> (b) ensure that where any interests that it is required to serve under any law relating to corporations conflict with the interest referred to in paragraph (a), the latter shall prevail.
>
> (4) It shall be the duty of the exchange to take appropriate action as may be provided under its rules for the purpose of monitoring or securing compliance with such rules.

[6] In the discharge of its statutory duties Bursa issues rules and requirements which are monitored and enforced. A company that is listed in the official list of the Bursa is governed by Listing Requirements (LR) that set out the minimum standards of conduct that must be complied by listed companies. The purpose of the LR is also to specify the requirements that must be complied by applicants, listed issuers, management companies trustees, the directors officers or other persons to whom the LR is directed.

A [7] The underlying principles upon which the LR are based include that of the requirement that the investors and public shall be kept fully informed by the listed companies of all facts or information that might affect their interests and in particular, full, accurate and timely disclosure shall be made of any material information which may reasonably be expected to have
B material effect on the price, value or market activity in the securities of listed companies or the decision of a holder of securities of the listed company or an investor in determining his choice of action.

C **[8]** In the context of this appeal specific attention has been drawn to the following provisions of the LR that is:

(i) Paragraph 9.16(1) which stipulates that the contents of the press or other public announcement is as important as its timing. A listed issuer must ensure that each announcement is factual clear, unambiguous,
D accurate, succinct and contains sufficient information to enable investors to make informed investments decision.

(ii) Paragraph 9.22(1) — a listed issuer must give the Exchange for public release, an interim financial report that is prepared on a quarterly basis
E (hereinafter referred to as 'quarterly report'), as soon as the figures have been approved by the board of directors of the listed issuer, and in any event not later than two months after the end of each quarter of a financial year.

F (iii) Paragraph 9.23 — a listed issuer must ensure that the issuance of the annual audited accounts and annual report by a listed issuer shall be as follows:

(a) the annual report shall be issued to the listed issuer's shareholders
G and given to the Exchange within a period not exceeding six months from the close of the financial year of the listed issuer; and

(b) the annual audited accounts together with the auditors' and directors' reports shall, in any case, be given to the Exchange for public release, within a period not exceeding four months from the
H close of the financial year of the listed issuer unless the annual report is issued within a period of four months from the close of the financial year of the listed issuer.

(iv) Paragraph 16.11 — a director of a listed issuer must not:

I (a) cause, aid or abet a breach of these LR by such listed issuer; or

(b) permit, either knowingly or where he had reasonable means of obtaining such knowledge, a listed issuer to commit a breach of these LR.

(v) Paragraph 16.17 sets out the various penalties that may be imposed on the listed company and the directors for breach of the LR.

[9] Transmile is a company listed in the official list of the Bursa. GBA was appointed a non-independent executive director cum Chief Executive Officer of Transmile until 19 June 2007 after which he held the position of non-executive director of Transmile. Particularly relevant in this appeal are paras 2.02 and 2.04 of the LR which Transmile and GBA are obliged to adhere to:

2.02 Purpose of these Requirements

> The purpose of these Requirements is to set out the requirements that must be complied with by all applicants, listed issuers, management companies, trustees, their directors, officers, advisers or other persons to whom these Requirements are directed. Failure to comply with any of these Requirements will amount a breach in respect of which actions may be taken and/or penalties may be imposed.

2.04 Obligation to comply

(1) A listed issuer whether or not admission of its securities shall have taken place prior to these Requirements being prescribed shall by virtue of its admission to the Official List, be bound by these Requirements and the Rules of the Exchange.

(2) A listed issuer, a management company, a trustee, its directors, officers, advisers or any other person to whom these Requirements are directed must comply with these requirements for so long as the listed issuer shall remain on the Official List. This applies even during periods when a listed issuer's securities are suspended from trading.

[10] The summary of facts leading to the application being filed for leave for judicial review is the following.

[11] Transmile had reported:

(i) A net profit of RM157.38m in its fourth quarterly report for the financial year ended 31 December 2006 (4th QR 2006 issued on 15 February 2007); and

(ii) A net profit of RM84.386m in its annual audited accounts for the financial year ended 31 December 2005 (AAA 2005) issued on 27 April 2006.

[12] Transmile then made an announcement on 16 June 2007 of material adjustments to be made to its financial statements pursuant to a special audit by Moores Rowland Risk Management Sdn Bhd. On 2 July 2007 Transmile issued its annual audited accounts to Bursa for the financial year ended 31 December 2006 (AAA 2006) reporting a net loss of RM126.329m and a restated annual audited accounts (AAA 2005) reporting a net loss of RM369.563m.

[13] On 24 May 2007 Bursa issued a notice to show cause to GBA as to why he should not be penalised for breaching para 16.11(a) and (b) LR in respect of the delay in the submission of AAA 2006 submitted on *2 July 2007* when it should have been done on *30 April 2007*. On 10 July 2007 another show cause notice was issued in respect of the delay in the submission of the Annual Report for the financial year ended 31 December 2006 (AR 2006) as well as the Quarterly Report for the First Quarter ended 31 March 2007 (or 1st Quarter 2007) where both were submitted on *15 August 2007* when both should have been submitted on *30 June 2007 and 31 May 2007* respectively.

[14] On 12 July 2007 the Securities Commission preferred criminal charges against GBA pursuant to s 86(b) of the Securities Industry Act 1983 ('SIA 1983') read with s 122C of the same in relation to the 4th OR 2006. Those provisions of the SIA 1983 have since been superseded by ss 177 and 370 of the CMSA 2007 respectively. Section 86 of the SIA 1983 states:

> 86 Subject to section 87B, a person shall not make a statement, or disseminate information, that is false or misleading in a material particular and is likely to induce the sale or purchase of securities by other persons or is likely to have the effect of raising, lowering, maintaining or stabilizing the market price of securities if, when he makes the statement or disseminates the information —
>
> (a) he does not care whether the statement or information is true or false; or
>
> (b) he knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.

[15] The charge itself states:

> That you, between 28 February 2006 to 15 February 2007, at Bursa Malaysia Securities Berhad, Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, abetted Transmile Group Berhad (Company No 373741-W) in making a statement that is misleading in a material particular in Transmile Group Berhad's 'Quarterly Report On Unaudited Consolidated Results For The Financial Year Ended 31 December 2006' and the

misleading statement is underlined in red in the Appendix to this charge, and the said statement is likely to induce the purchase of securities of Transmile Group Berhad by other persons, and when the statement was made Transmile Group Berhad ought reasonably to have known that the statement is misleading in a material particular, and you have thereby committed an offence under section 86(b) read together with section 122C(c) of the Securities Industry Act 1983 (Act 280) and punishable under section 88B of the same Act.

[16] The said provision and the charge do not contain any reference to delay. By way of a notice dated *20 August 2007* GBA was informed that the Bursa fixed the first date of hearing in respect of the notices to show cause dated 24 May 2007 and 10 July 2007 termed the enforcement proceedings. The hearing was fixed for *29 August 2007*. In reply to this GBA by a letter dated *27 August 2007* stated, inter alia:

5. Bursa will have already noted from my letter of 8-8-2007 (which is not enclosed in the Memorandum), which I enclose herewith for ease of reference, that the Securities Commission has initiated charges against certain officers of the Company, including myself on 12-7-2007 and I have claimed trial to the relevant charge.

6. The relevant suit no. is 62A-302-07 which is fixed for trial from 23-1-08 to 25-1-07. As I understand it, the Court will need to address its mind as to whether certain of the Company's officers had knowingly abetted the Company in issuing false or misleading unaudited accounts for the financial year ended 31 December 2006 of the Company (4th QR 2006).

7. ...

8. Hence, Bursa's *proposed deliberation will cause an overlap on a very central issue before the Court. Any representations or decision made is sub-judice*. For this reason, I am constrained from making any substantive comments before Bursa for the deliberation on 29–8–2007. For this reason, I am also unable to attend and make oral representations.

9. That being the case, it is my humble suggestion that Bursa defers or stay this deliberation pending the outcome of the Court trial. In the interim, I reserve all my rights to make representations at such future or deferred deliberations.

10. In the event Bursa should decide to proceed with deliberations and decide on 29–8–2007, *I shall have no alternative but to seek legal redress on the validity of such proceedings and/or any adverse decision made against me.*

(Emphasis added.)

[17] Bursa vide letter dated 4 September 2007 responded to the averment that the matter is sub judice in the following terms:

> *Please note that it is Bursa Securities' views that there is no issue of sub judice and the enforcement action by Bursa Securities against you for breach of para 16.11 of the LR in respect of the Company's non-submission of the AAA 2006, AR 2006 and 1st QR 2007 within the stipulated time frames in the discharge of Bursa Securities' statutory duty would not prejudice the fair and proper trial of the Suit based on, amongst others, the following grounds:*
>
> (i) *Although there may be some overlap in the facts* in the enforcement action by Bursa Securities against you and in the Suit, the *considerations are wholly different.*
>
> The issue for consideration by Bursa Securities *essentially relates to the Company's non-submission of the AAA 2006, AR 2006 and 1st QR 2007 within the stipulated timeframes under the LR and your culpability as a director of the Company in this respect. This is wholly different from the issue as to whether the 4th QR 2006 was in fact false or misleading which is required to be determined by the Court in the Suit.* Notwithstanding the allegation that the accounting defects in the 4th QR 2006 have caused the delay in the submission of the AAA 2006, AR 2006 and 1st QR 2007, the issue as to whether the accounts are in fact misleading or false is not an issue for determination by Bursa Securities in this enforcement for delay in submission of the financial statements; and
>
> (ii) In addition, *the enforcement action under the LR and the Suit can proceed simultaneously as they operate in distinct and different jurisdictional areas.*
>
> In view of the above, you are hereby required to submit your written response to all matters contained in the Listing Committee Memo No L95 of 2007 which was earlier forwarded to you within *seven (7) days* from the date of receipt of this letter, failing which Bursa Securities shall assume that you have no further representations and the Listing Committee will proceed to deliberate on the matter without further notice to you.

(Emphasis added.)

[18] On 21 March 2008 GBA filed the notice pursuant to O 53 r 3 of the RHC seeking leave to commence proceedings for the various reliefs described above. It has also been indicated to us that at the proceedings before the High Court judge no formal application was made for the stay of the deliberations scheduled by the Bursa for 31 March 2008 until the hearing of the judicial review. The grounds submitted in support of the application for leave for judicial review constitute the very same grounds which have been canvassed in this appeal.

[19] The grounds are listed as follows:

(1) In view of the pending Criminal Proceedings, the deliberation to be conducted by Bursa on 31 March 2008 would be sub judice;

(2) Bursa's deliberation is a decision amenable to judicial review as it is a body that performs a public duty in prescribing and administering the LR which is to ensure all public listed companies in Malaysia conform to the listing requirements; and it is a regulatory body of all public listed companies in Malaysia;

(3) GBA has met all the prerequisites for the application for judicial review pursuant to O 53 r 3 of the RHC; and

(4) GBA's application for judicial review is not frivolous or vexatious and GBA has a good arguable case.

[20] The principal contention is that the High Court judge has erred in law and in fact in granting leave. At the core of this appeal lies the question whether the Bursa's decision to proceed with wide enforcement measures against the GBA in furtherance of its Listing Requirements is non justiciable as it entails the review of a decision of a regulator of a capital market who is vested with a statutory duty to ensure so far as reasonably practicable a fair and orderly market for securities trade in the Bursa's official list.

[21] The relevant provisions of O 53 r 3 of the RHC pursuant to which the application for leave was made stipulate:

(1) No application under this Order shall be made unless leave therefor has been granted in accordance with this rule.

(2) ...

(3) ...

(4) ...

(5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[22] Judicial review involves a discretionary remedy and for consideration here is the question of the principles by which the discretion is to be exercised

A at the application for leave stage, which in effect, is the preliminary stage and which stage has been termed by counsel for the Bursa as the threshold test for leave. In *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 at p 842 Sir J Donaldson MR commented: 'an application for judicial review is not an appeal'. It is averred that GBA has to establish an arguable B case. In the context of this appeal the expression 'arguable case' has been used interchangeably with the expression 'prima facie' as well as the expression 'threshold requirement'. It is agreed by counsels for the Bursa and GBA that there must be some substance in the grounds supporting the application such that the application for leave is not rendered frivolous or vexatious.

C

[23] It is noted that O 53 r 3 of the RHC has no equivalence to the corresponding provision O 53 r 3(1) of the English Supreme Court Practice 1993 which makes a specific stipulation that 'the court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to D which the application relates. Irrespective of the absence of the words 'sufficient interest' the question of what constitutes an arguable case or a prima facie case or establishing a threshold requirement, namely, whether an applicant has the requisite standing is a mixed question of fact and law. We have been referred to *Association of Bank Officers, Peninsular Malaysia v* E *Malayan Commercial Banks Association* [1990] 3 MLJ 228 and *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 MLJ 53 and cited to us are judicial propositions that elucidate the principles that guide a court in exercising its discretion at the leave stage. However it is noted that in both cases cited the relief sought were made in respect of illegalities in the F processes and or invalid acts undertaken by statutory bodies. *Ta Wu*'s case, referred to another principle namely that leave will be given in exceptional circumstances. It would appear that what has been expressed in *Ta Wu*'s case is that when there is an alternative remedy of appeal leave will be granted in exceptional circumstances such as:

G

(a) a clear lack of jurisdiction;

(b) a blatant failure to perform some statutory duty; and

(c) a serious breach of the principles of natural justice.

H

[24] Two decisions of the Court of Appeal are noteworthy of mention here. In *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 56 the Court of Appeal refers to a two stage process where an application for leave is made and at the leave stage the High I Court should not go into the merits of the cases. In *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532 two points require mention. The first point for mention is that arguments such as the availability of an alternative remedy go to the merits of the substantive application and ought not to be dealt with at the leave stage. Applying this

approach on an extension the High Court is therefore precluded from considering whether there are exceptional circumstances for granting leave.

[25] The second point is the matter of the standing of the applicant which is elaborated as follows:

> [16] ... There is a single test of threshold locus standi for all the remedies that are available under the order. It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'. At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned. See *Finlay v Canada* (1986) 33 DLR 421. This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty of property in the widest sense (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 CLJ 771) has been or is being or is about to be infringed. In all such cases, the court must, ex debito justitiae, grant the applicant threshold standing. See for example *Thorson v Attorney General of Canada* [1975] 1 SCR 138.
>
> [17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as de minimis. In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in *Malik Brothers v Narendra Dadhich* AIR 1999 SC 3211, where, when granting leave, it was said:
>
> > Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.
>
> [18] In an ordinary case, if on a reading of the application for leave to issue judicial review the court is satisfied that the applicant has neither a

sufficient personal interest in the legality of the impugned action in the sense already discussed, nor is the application a public interest litigation, then leave may safely be refused on the ground that the applicant is not a person 'adversely affected'. In this context, the court must bear in mind what Lord Diplock said in *Inland Revenue Commissioners v National Federation of Self-employed & Small Businesses Ltd* [1982] AC 617:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

[26] The emphasis is that the question of standing can be properly considered in the light of matters such as the duties (if any) which the applicant contends the respondent was under in respect of which it is contended that those duties have been breached as well as the proper construction of any relevant statutory material or regulations. Reverting to the circumstances in this appeal, GBA's application for leave is primarily grounded upon the alleged applicability of the sub judice rule whereby in GBA's letter of 27 August 2007 objections were directed to the deliberations intended to be convened by the Listing Committee as enforcement measures which were eventually scheduled for 31 March 2008.

THE SUB JUDICE RULE

[27] At the time of the hearing of the GBA's application pursuant to O 53 r 3 of the RHC the trial of the criminal proceedings was scheduled to be conducted from 5 May 2008 to 8 May 2008 and fixed further for hearing on 17 November 2008. It is therefore averred that in view of the pending trial the deliberation to be conducted by Bursa scheduled for 31 March 2008 would be sub judice. It is obvious that the argument advanced by GBA that in view of the pending criminal trial, the deliberations to be conducted by the Bursa on 31 March 2008 would be sub judice is also influenced by the Bursa's acknowledgement that there are some overlap of facts in the enforcement action by the Bursa against GBA and in the criminal proceedings preferred by the Securities Commission.

[28] The Bursa has maintained 'that there is no issue of sub judice and that the enforcement action against the applicant in the discharge of statutory duties will not prejudice the fair and proper trial of the pending criminal suit initiated by the Securities Commission'. GBA by his own averments had contended that the representations to be made by him before the Listing Committee for the purposes of the enforcement proceedings in respect of the show cause letters would become sub judice pending the outcome of the trial. Admittedly there is a third show cause in relation to deviations between audited and unaudited accounts for the year 2006, as well deviations between audited and restated audited results no deliberation but no date has been scheduled for the deliberations to take place.

[29] Whilst there is a reminder from counsel for GBA that the court should not dwell on the merits, the court is still able to embark on a perusal of the matters as put before it by the parties in order to evaluate whether GBA has established an arguable case.

[30] This court has been invited through oral submissions to embark on some assumptions that if the deliberations of the Listing Committee (LC) were to be permitted the outcome of it would be various matters relevant to the criminal trial would be publicised such as to cause prejudice or even to pervert the criminal proceeding that are pending.

[31] The law in relation to what may be published concerning current legal proceedings is sometimes referred to as the sub judice rule. The publications are such they are intended to impede or prejudice the administration of justice which may in turn constitute acts punishable as contempt of court. The true nature of the doctrine itself requires that there have to be established an actus reus and mens rea to cause certain publications which would have a prejudicial effect on the criminal proceedings. In the appeal before us it cannot even be gleaned whether the situation could lead to civil contempt. Hence the court is invited to consider assertions which are speculative.

[32] In *Attorney General v Times Newspaper Ltd* [1973] 3 All ER 54 Lord Denning MR stated:

> When litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause. Even if the person making the comment honestly believes it to be true, still it is contempt of court if he prejudges the truth before it is ascertained in the proceedings. To that rule about a fair trial, there is this further rule about bringing pressure to bear on one of the parties to a cause so as to force him to drop his complaint, or to give up his defence, or to come to a settlement on terms which

A he would not otherwise have been prepared to entertain. The law should be maintained in its full integrity. We must not allow 'trial by newspaper' or 'trial by television' or 'trial by any medium' other than the courts of law. This law applies only when litigation is pending and is actively in suit before the court and there must appear to be 'a real and substantial danger of prejudice' to the trial of the
B cause or matter or to the settlement of it.

[33] Although it was suggested here that at the crux of the matter there may be some overlap of facts, in effect this should not blur the different functions and the different objectives. It is trite a court of law in conducting a trial is
C guided inter alia by rules of evidence pertaining to the admissibility of evidence. It is apropos to mention judicial statements made in the course of *R v Michael S Chance Ex Parte Smith & Ors* [1995] BCC 1095.

[34] Some mention of the facts in that case is necessary in view of certain
D similarity of circumstances. There was in that case an application for judicial review in which the applicants are the United Kingdom partnership of Coopers & Lybrand and three named individual partners. The respondent is the Executive Council appointed for the purposes of the Joint Disciplinary
E (JD) of the Institute of Chartered Accountants which is the applicant's professional body. The application challenges a decision by the respondent refusing the applicant's request for a stay of the JD's enquiry and anticipated consequent disciplinary proceedings against the firm and/or the individual named partners pending the disposal of various civil actions for damages
F against the applicants arising out of the same matters. On 5 November 1991 Robert Maxwell the Chairman of the Mirrors Group of Newspapers plc died. Following his death it became apparent that there had been large misappropriation of assets belonging to the pension funds of various public companies with which he was concerned. Other Maxwell companies were the
G trustees and/or managers of the assets in question. Coopers & Lybrand were the auditors both of the pension funds and of the companies that were the trustees and managers of the relevant assets of those funds. These stewardship came under scrutiny one of which was that they have played an important role in various enquiries and investigations consequent upon the discoveries.
H One of the investigations is that which was being undertaken by the Serious Fraud Office into possible criminal conduct which resulted in criminal proceedings against a number of individuals connected with the Maxwell Group Companies and the first criminal proceeding was due to commence.

I **[35]** In that case, the position was also similar in that submissions were made with regard to the real risk of prejudice that may lead to injustice arising from an overlap of facts. Stay of the disciplinary proceeding was refused. What requires specific mention is the statement of Henry LJ in delivering judgment as follows:

> ... the suggestion is made that the connection of the JD's enquiry might prejudice the criminal trials. The parties and the court in those trials will be alive to any potential risk of prejudice to them. The responsibility for preservation of the integrity of those trials rest with the courts in those trials. In the unlikely event of their integrity being threatened by the hearing (in private in the first instance) of the disciplinary proceedings or the publication of the finding thereof, then the criminal court has ample powers to obtain an order restraining publication until after the conclusion of the criminal trials. There are no grounds for this court interfering at this stage on that score.

[36] It is found at the stage of the application for leave GBA is unable to establish what parts of the material overlap which would form part of the materials in the criminal proceeding would also be part of the deliberations of the enforcement proceedings such that there would also be publications of the subject matters of the deliberation. In other words the court is being invited to embark on a form of investigative journey into the materials which are likely to be placed before the deliberations of the LC as well as the criminal proceedings. Matters before the LC relate to the issue of delay. The court in the pending criminal proceeding based on the charge will consider essentials of what constitute 'making misleading statements'. The respondent has not shown that there is here a situation where a court and the LC would contemporaneously be considering the same or identical issues in a manner that one would affect the evaluation in the other. There are suggestions that the LC subsequent to its deliberation would be expected to issue publications such that GBA will be prejudiced in facing the trials. At this stage the assertions are conjectural in nature. Neither is it shown that ultimately the decision in the LC would lead to a predetermination of the matters pending in the criminal trial. Neither prejudice nor the perversion of justice is indicated.

[37] There is therefore here a considerably premature action on the part of GBA. In our view GBA has failed to raise an arguable case. Even assuming it is otherwise there is the related question whether Bursa in its decision to proceed with its statutory duty of conducting the enforcement proceedings is amenable to judicial review.

THE CASE FOR JUDICIAL REVIEW

[38] Counsel for GBA has cited *R v Panel on Take-overs and Mergers, ex parte Datafin plc and another (Norton Opax plc and another intervening)* [1987] 1 All ER 564 and referred to the statement of Lloyd LJ:

> On the basis of that speech, and other cases to which he referred us, counsel for the panel argues (i) that the sole test whether the body of persons is subject to judicial review is the source of its power, and (ii) that there has been no case where that source has been other than legislation, including subordinate legislation, or the prerogative.

I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: see *R v Disputes Committee of the National Joint Council for the Craft of Dental Technicians, ex p Neate* [1953] 1 All ER 327; [1953] 1 QB 704.

But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as counsel for the applicants submitted, be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. Thus in *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 All ER 770 at p 778; [1967] 2 QB 864 at p 882 Lord Parker CJ, after tracing the development of certiorari from its earliest days, said:

> The only constant limits throughout were that the body concerned was under a duty to act judicially and that it was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is from the agreement of the parties concerned.

To the same effect is a passage from a speech of Lord Parker CJ in an earlier case, to which we were not, I think, referred, namely *R v Industrial Court, ex p ASSET* [1964] 3 All ER 130 at p 136; [1965] 1 QB 377 at p 389:

> It has been urged on us that really this arbitral tribunal is not a private arbitral tribunal, but that, in effect, it is undertaking a public duty or a quasi-public duty and, as such, is amenable to an order of mandamus. For my part, I am quite unable to come to that conclusion. It is abundantly clear that they had no duty to undertake the reference. If they had refused to undertake the reference they could not be compelled to do so. I do not think that the position is in any way different once they have undertaken the reference. They are clearly doing something which they were not under any public duty to do, and, in those circumstances, I see no jurisdiction in this court to issue an order of mandamus to the Industrial Court.

More recently in *R v BBC, ex p Lavelle* [1983] 1 All ER 241; [1983] 1 WLR 23 Woolf J had to consider an application for judicial review where the relief sought was an injunction under O 53 r 1(2). The case was brought by an employee of the BBC. In refusing relief Woolf J said ([1983] 1 All ER 241 at p 249; [1983] 1 WLR 23 at p 31):

> Paragraph (2) of r 1 of O 53 does not strictly confine applications for judicial review to cases where an order for mandamus, prohibition or certiorari could be granted. It merely requires that the court should have regard to the nature of the matter in respect of which such relief may be granted. However, although applications for judicial review are not confined to those cases where relief could be granted by way of prerogative order, I regard the wording of O 53 r 1(2) and sub-s(2) of s 31 of the Supreme Court Act 1981 as making it clear that the application for judicial review is confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character. The disciplinary appeal procedure set up by the BBC depends purely on the contract of employment between the applicant and the BBC, and therefore it is a procedure of a purely private or domestic character.

> So I would reject counsel for the panel's argument that the sole test whether a body is subject to judicial review is the source of its power. So to hold would in my judgment impose an artificial limit on the developing law of judicial review. That artificiality is well illustrated in the present case by reference to the listing regulations issued by the Council of the Stock Exchange. As the foreword to the current edition makes clear, a new edition of the regulations became necessary as the result of the Stock Exchange (Listing) Regulations 1984, SI 1984/716. Those regulations were made as the result of a requirement of an EEC Council directive. Counsel for the panel conceded that the listing regulations are now the subject of public law remedies. By contrast (if his submission is correct) the code, which is the subject not of a Council directive, but of a Commission recommendation, is not.

[39] The contention that Bursa's decision to proceed with the deliberations is amenable to judicial review is premised on the following (i) that Bursa is a body that performs a public duty in prescribing and administering the LR which is to ensure all public listed companies in Malaysia conform to the listing requirements and (ii) it is a regulatory body of all public listed companies in Malaysia. Apposite to this is the fact that Bursa is a stock exchange and pursuant to s 11 is vested with a statutory duty, inter alia, to 'ensure' so far as may be reasonably practicable an orderly and fair in the securities or future contracts that are traded through the facilities. Section 11 has been previously cited above. Noteworthy is s 11(3) where it is emphatic that the exchange shall 'act in the public interest having particular regard to the need for the protection of investors'. This aspect has not been challenged at all in the circumstances of this appeal.

[40] To revert briefly to *R v Panel on Take-overs*, it is also stated by Lloyd LJ:

> So once again one come back to what I regard as the true view, that it is not just the source of the power that matters, but also the nature of the duty ...

A **[41]** It has been contended before us that Bursa has a statutory duty to maintain an efficient, well-informed and internationally competitive market for the trading of securities. These are elements that will foster and anchor the investor's public confidence. In seeking to enhance the statutory duty Bursa has a two fold approach. Firstly the Bursa issues monitors and enforces rules B and requirement pertaining to the conduct of listed companies. Secondly Bursa would necessarily be committed to undertake swift and deterrent enforcement measures against errant listed companies on its directions. The efficacy of Bursa's enforcement actions is to be sustained by its own internal procedures, commencing with a show cause notice, deliberation and decision C making process by a tribunal that is intended to decide on matters, concomitant with its public interest object of promoting market integrity and invest protection. Counsel for the Bursa has made a painstaking effort to elucidate that while there may be an overlap of materials to be presented in the enforcement proceedings of Bursa and the criminal proceedings D nevertheless in the case of the latter the issues to be raised by the Securities Commission in preferring charges against GBA remain disparate as and when those issues are being deliberated in the criminal proceedings that remain pending. In essence at the heart of the enforcement proceedings of Bursa, as a regulator of a capital market, timeliness and accuracy are crucial factors.

E

[42] Counsel for the Bursa has also referred to the decisions in *Kwikasair Industries Ltd v Sydney Stock Exchange Ltd* (1968) ASLC 30701 and *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, Ex parte Else Ltd & Anor* [1993] QB 534 which reflect the importance F of the Stock Exchange in its role of upholding its public duty as the regulator of the capital market.

[43] While the Bursa remains a body vested with statutory powers there are peremptory requirements that the Bursa itself has to observe and implement G to sustain the required orderly and fair market in respect of securities or future contracts. Uppermost it has to act in public interest singularly for the protection of investors in the financial sectors. There is therefore here a spectrum of matters in the realm of financial implications and complexities. In effect there is a homogenised issue of a public duty and private law matters. H The situation warrants a reference to the judicial statement in *R v Securities and Futures Authority ex p Panton* (unreported; 20 June 1994) per Sir Thomas Bingham:

> I It seems to me quite plain they are bodies over whom the court can, in appropriate circumstances, and will exercise a supervisory jurisdiction, but recognition of that jurisdiction must in my judgment be combined with a recognition that the clear intention of the Act is that the bodies established under that Act should be regulatory bodies and that it is not the function of the court in anything other than a clear case to second guess their decisions or, as it were to look over their shoulder.

[44] Apart from submissions premised on the sub judice rule GBA has not been able to persuade this court that the enforcements proceedings are in excess of statutory authority or so erroneous in law such that in that regard the Bursa is rendered susceptible to judicial review. In a highly fluid financial market the true nature of the reliefs sought are calculated to impose a crippling delay in derogation of the principle of timeliness and accuracy which is inept in matters of financial control.

THE DELAY THAT IS ALLEGED IN THE FILING OF THE APPLICATION FOR LEAVE

[45] It is also an issue here whether GBA in filing the application for leave for judicial has adhered to the time frame prescribed in O 53 r 3(6). It is stipulated therein that an application 'shall be made promptly and any event within 40 days from the date when grounds for the application first arise or when the decision is first communicated to the applicant'.

[46] Here again GBA is contesting the averment of the Bursa that the application was made outside the time prescribed. It is essential to note that there is a requirement for the application to be made promptly and in any event within 40 days. The contention that the application for leave is timeous is predicated on the fact that the date of filing (ex parte) being 21 March 2008, it was within the 40 days required. The issue however is what is the material date with effect from which the time limit will begin to operate. On behalf of GBA it is stated to be 19 February 2008.

[47] It is apt to revert to the contents of the letter dated 27 August 2007 where GBA, in response to the letter from the Bursa dated 20 August 2007, first raised the issue of the applicability of the sub judice rule (as reproduced above). It was also in that very letter that GBA had himself indicated that in the event Bursa should decide to proceed with deliberations and decide on 29 August 2007 'I shall have no alternative but to seek legal redress on the validity of such proceedings and/or any adverse ...' In essence the ground upon which the application for leave has been made is pivoted on the alleged applicability of the sub judice rule and none other. The Bursa's response is found in the letter dated 4 September 2007 (as reproduced above). The relevant portions (to recapitulate) asserted the Bursa's view that there is no issue of sub judice, and that while there may be overlap of facts the enforcement under the LR 'can proceed simultaneously as they operate in distinct and different jurisdictional areas'. We are also of the view that the different jurisdictional area would also portend that the Bursa in its deliberations and the criminal proceedings would also address different issues with different rules of evidence and the eventual standard of establishing responsibility. *In the same letter of 4 September 2007 the Bursa in specific terms*

reminded GBA that if no written response was made within seven days from the date of receipt of the letter dated 4 September 2007 'Bursa Securities shall assume that you have no further representations and the Listing Committee will proceed to deliberate on the matter without further notice'.

[48] It is noted that on 11 September 2007 GBA again opposed the view of Bursa and claimed it was untenable. He in fact insisted that 'I must take the position that I am constrained by sub judice'.

[49] Pursuant to the letter from the Bursa dated 4 September (see above) GBA by a letter 11 September 2007 persisted in maintaining that the Bursa should refrain or to defer its proposed deliberations. In an undated letter GBA contended, inter alia:

> The fact that the considerations in the enforcement by you is different from the criminal suit and the fact that the standard of proof is markedly disparate is hardly relevant to the issues of sub judice.
>
> In the light of our differing views, I shall be grateful if you could kindly grant me an extension of 2 weeks from your dateline to apply to court to seek a declaration as to whether in the circumstances, your action is deemed to be sub judice or otherwise. In the meantime, we trust that Bursa Securities will not proceed with any further action.

[50] By letter dated 16 November GBA attempted to explain the alleged breaches. The Bursa by letters dated 9 October 2007 and 29 October 2007 refuted the issue of sub judice and reiterated its position that the enforcement action in the discharge of the Bursa's statutory duty will not prejudice the fair and proper trial of the pending criminal suit initiated by the Securities Commission. A similar letter dated 26 November 2007 was also sent to GBA.

[51] On 19 February 2008 the Bursa notified GBA that the Listing Committee will convene on 29 February 2008 to deliberate. On 22 February 2008 GBA responded and claimed:

> 5. Given that Bursa had not responded to my last letter of 11 September 2007 I was lulled into the impression that Bursa had acceded to my request to defer these proceedings until after the court process on the grounds of sub judice.
>
> 6. As such, I will now have to revisit the issue of making an application to court for determination of Bursa's decision to convene a deliberation as conveyed by the Bursa letter. I am advised that under the rules of court I have 40 days from the date of receipt of Bursa's letter (ie 20th February) to apply for relief to question Bursa's decision to proceed.

[52] On 27 February 2008 the Bursa responded in the following terms, inter alia:

> Bursa Securities wishes to reiterate its views as stated in our earlier letter dated 4th September 2007 that there is no issue of sub judice and that the enforcement action against you in the discharge of Bursa Securities statutory duty will not prejudice the fair and proper trial of the pending criminal suit initiated by the Securities Commission against you.
>
> Bursa Securities also wishes to put on record that at no time did Bursa Securities accede to your request to defer deliberation of the enforcement action until after determination of the criminal suit against you. Whilst we take of your representations in the letter dated 11 September 2007, no reply was made as we have clearly set out our position in this matter in our earlier letter dated 4 September 2007.

[53] It is found that the material date from which the 40 days is to be calculated is indeed 4 September 2007 and not 19 February 2008. The former date is the actual date upon which the Bursa resisted attempts by GBA to preclude the LC from proceeding to deliberate. The letter of 4 September 2007 is antecedent to the letter of 19 February 2008 that is merely indicating the actual date that the LC proposed to deliberate and in the letter of 4 September 2007 GBA was also invited to submit if he so wished any written response. No explanation or justification is furnished to explain the delay in filing the application in breach of the 40 days requirement. In effect the very conduct of GBA in maintaining that the sub judice rule apply and declining to submit representations lent itself to a situation where there was a self imposed effluxion of time. It was GBA at the first instance who asserted that he would seek legal redress which materialised in the form of the application for leave for judicial review when the notice was filed on 21 March 2008. It was a period of more than five months from the date that the Bursa refuted assertions about the applicability sub judice rule.

[54] Under the circumstances there is an absence of prompt action without any reasonable explanation given for the delay.

THE ORDER FOR STAY OF THE DELIBERATIONS OF THE LC

[55] In *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd & Anor* [1991] 1 WLR 550, Lord Oliver of Aylmerton observed that:

> A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place.

[56] In *R v Secretary of State for Education and Science, ex p Avon County Council* [1991] 1 QB 558 (CA) there is discussion of the difference between a 'stay' and an injunction. Lord Justice Glidewell said (at pp 561–562):

> In my view, this question comes back to the issue whether the phrase 'a stay of the proceedings' is apt to include decisions made by the Secretary of State, and the process by which he reached such decisions. If I am correct in my view that the phrase is wide enough to embrace such decisions, it follows that what is sought is just as much a stay as it would be in relation to a decision or judgment of an interior court. *It is not properly described as an injunction, which is an order directed at a party to litigation, not to the court or decision-making body*. Of course, in some respects an application for judicial review appears to have similarities to civil proceedings between two opposing parties, in which an injunction may be ordered by the court at the suit of one party directed to the other. When correctly analysed, however, the apparent similarity disappears. *Proceedings for judicial review, in the field of public law, are not a dispute between two parties, each with an interest to protect, for which an injunction may be appropriate. Judicial review, by way of an application for certiorari, is a challenge to the way in which a decision has been arrived at. The decision-maker may take part in the proceedings to argue that his, or its decision was reached by an appropriate procedure. But the decision-maker is not in any true sense an opposing party, any more than an interior court whose decision is challenged is an opposing party. Thus the distinction between an injunction and a stay arises out of the difference between the positions of the persons or bodies concerned. An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has finally been determined is, in my view, correctly described as a stay*. For these reasons I am of the opinion that a decision made by an officer or minister of the Crown can, in principle, be stayed by an order of the court.
>
> If I am correct in my view that the essential question is whether the phrase 'a stay of proceedings' is *apt to include decisions, and the process of arriving at such decisions, made by persons and bodies other than courts of law, and the answer is that it does not include such decisions and processes, it would follow that the courts have no jurisdiction, in judicial review proceedings, to stay decisions of local authorities or other non-judicial decision making bodies*. In other words, the court's jurisdiction or lack of it to order a stay is not dependent on whether the decision-maker is an officer or minister of the Crown. That the court should have the power to order a stay of a decision of a local authority pending the conclusion of a challenge to the decision-making process by way of judicial review I regard as apparent. I have sought to explain my reasons for concluding that the courts indeed have such a power.

[57] In the proceedings before the High Court counsel for GBA made an oral application for an interim order to stay the deliberations of the LC scheduled on 31 March 2008. Such an order was prayed for and alluded to for the first time in the written submissions submitted by GBA as the applicant for leave for judicial review. In the circumstances of this case where the application was made ex parte the Bursa being a putative respondent was allowed by the High Court judge to file written submissions during the

hearing of the ex parte notice of application for leave. Since the ex parte stage was not converted into an inter partes, which could have been done, GBA is not permitted, during the course of hearing this appeal, to raise objections to the effect that the Bursa is making statements from the Bar in an alleged failure to file affidavits to oppose the ex parte notice of application for leave. It was clear here that the judge has exercised his discretion in allowing written submissions to be made on behalf of the Bursa at the ex parte stage. The action of the trial judge however shows that if he had entertained any doubt that GBA has presented an arguable case he should have converted the ex parte proceeding into an inter partes stage. The anamoly here is that nevertheless submissions were allowed at the ex parte stage resulting, inter alia, in the granting of the order for stay arising from an oral application. It would appear that the learned judge must have exercised his discretion pursuant to O 53 r 5 of the RHC.

[58] O 53 r 3(5) of the RHC provides that the grant of leave under that rule *shall not* operate as a stay of the proceeding in question. In the circumstances of this appeal GBA in moving an oral application for stay should have provided grounds in order to enable the judge to exercise his discretion to grant stay. The order for stay in the circumstances of this appeal is tantamount to a prohibitory relief akin to an injunction. Order 53 r 2(3) expressly provides that an order of injunction may be granted but it has to be in the context of the substantive application for judicial review.

[59] At the leave stage O 53 r 3(5) indicates only a stay is permitted and hence although there may be similarities to an injunction, the stay order is specifically intended as an interlocutory order pending the disposal of the substantive application for judicial relief. In the absence of grounds of judgment we do not have the benefit of being acquainted with the reasons for which the discretion was exercised in favour of GBA when the order for stay was granted.

[60] Two questions arise. Firstly the decision in *ex p Avon*, discusses the question whether the phrase 'stay of the proceedings' is apt to include the processes by which authorities other than courts arrive a decision. In that case no doubt the question arose in relation to decisions made by the Secretary of State that is an executive decision. In that case however the Court of Appeal appeared to have leaned to the interpretation that the phrase 'stay of the proceedings' is capable if being applied to stay of decisions of 'local authorities or other non-judicial decision making bodies'.

[61] The granting of an order of stay in this appeal was granted as an *order ancillary to the granting of leave*. Hence similar to the consideration of the granting of an application for an interlocutory injunction, the applicant has to satisfy the requirements of establishing an arguable case or a prima facie case. In this appeal there is totally absent any affidavit supporting the application for an order for stay. Any arguments put forth in support of the order for stay must also be taken as statements from the Bar!

[62] The second question relates to the word 'proceeding'. The word is not defined in the RHC. The definition is to be found in s 3 of the Courts of Judicature Act 1964 ('CJA') which provides, inter alia, 'proceeding means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding'. It is debatable whether the words '*any proceeding whatsoever of a civil nature*' are wide enough to envisage a body such as the Listing Committee to put a stop to the further conduct of its deliberations. The term 'proceeding' is not further defined in the Interpretation Acts 1948 and 1967 and hence it must be given the ordinary construction in the context in which it appears.

[63] Counsel for the Bursa has referred to (i) *Rekapacific Bhd v Securities Commission & Anor and other appeals* [2005] 2 MLJ 269 (ii) *Harris Mohd Salleh v The Returning Officer, Ismail bin Hj Majid & Ors and another action (No 2)* [2001] 6 MLJ 610 (iii) *Otter Gold Mines Ltd v Deputy Forest (AAJ) & Ors* (1997) 22 ACSR 713. In *Rekapacific*, the Court of Appeal has set aside an order for stay of judicial review proceedings *pending appeal* on the ground that the shareholders of the company would not suffer irreparable harm from the delisting of the company and hence ought not to have granted. The test there would appear to be a test applicable for stay until the disposal of an appeal. In *Harris Mohd Salleh*, it was again a case of stay pending appeal to a court and reference was made to the fact that special circumstances must be established. In the *Otter Gold Mines Ltd*, the objection for stay arose in circumstances which were again vastly different. There the Federal Court of Australia was interpreting the provision of s 41(2) of the Administrative Appeals Tribunal Act 1975 which expressly conferred on the Administrative Appeals Tribunal pursuant to the said s 41(2) to impose a *stay on its own decision*. Moreover under s 15 of the Administrative Discussions (Judicial Review) Act 1977 (or AD(JR) Act) was an enabling provision which confers on the court express powers to order a stay on to suspend the operation of the decision of the Administrative Appeals Tribunal. It is indicative that the Federal Court of Australia was conferring a framework of legislative which enabled the judicial review of the decision of an administrative character stipulated under an enactment.

[64] In this appeal the order for stay has been made in respect of an internal body of the Bursa which has not even embarked on its deliberation. The LC of the Bursa is just about to commence a process of deliberations and which is expressly allowed within the framework of the Bursa itself.

[65] It has been indicated above that the GBA has failed to raise an arguable case as the vein of his application is solely grounded on the alleged application of the sub judice rule. The court would be embarking on a process of rewriting a subsidiary legislation namely the RHC if it were to permit an interpretation of the words 'proceedings in question' to be applicable to an internal decision making process made by Bursa to convene a committee to deliberate on the non-compliance by GBA of the LR of the Bursa. There is here a serious and clear misdirection in the exercise of a discretion which warrants appellate interference. It would spell an excess of power if 'stay of proceedings' in this appeal would be extended to the internal deliberations of the Bursa being a commercial entity vested with regulatory measures in the capital market. Once again nothing has been alleged of illegalities but merely unsubstantiated allegations of prejudice amounting to an abuse of process in seeking the court's intervention.

[66] For the reasons given above the appeal is allowed with costs here and below. The order of the High Court in granting leave to apply for judicial review is set aside. The order for stay of the deliberations is also set aside. Deposit is refunded to the Bursa.

Appeal allowed with costs. Orders of the High Court granting leave to apply for judicial review and for stay of Bursa's deliberations set aside.

Reported by K Nesan